In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1489

LAWRENCE C. DAVENPORT, ET UX., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION

The opinion of the court of appeals (Pet. App. A) is reported at 436 F. 2d 395. The report of the commission (Pet. Supp. App. 1–10) and the district court's order affirming that report (Pet. Supp. App. 11–12) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on December 22, 1970. The petition for a writ of certiorari was filed on March 19, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

423-089—71

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, on the record in this condemnation case, project-created enhancement must be considered in fixing the value of the remainder because such enhancement was a special and direct benefit to the remainder.

2. Whether the court of appeals properly determined the issue of just compensation in the circumstances of this case.

3. Whether petitioners' rights were violated because the estimated just compensation deposited by the government with the district court before trial was greater than the value proved by the government at the trial.

STATEMENT

In this condemnation action the government sought to acquire for use in connection with the J. Percy Priest Dam and Reservoir Project on the Stones River in Tennessee fee title to 144.8 acres of a 218.8-acre tract owned by petitioners.

Petitioners originally owned some 170 acres in the project area, all of which initially was to be taken by the government. Subsequently it was determined that only the 144.8 acres here in issue would be needed, and thus petitioners would be left with a 24.85-acre remainder. After announcement of the project but before filing of the declaration of taking, petitioners acquired an adjoining 49-acre tract and thereby provided road access for the 24.85-acre remainder. As a result of this acquisition petitioners owned approxi-

mately 74 acres following the taking (Pet. App. A17, Pet. Supp. App. 3–4).

The 74-acre remainder was contiguous to the project. While no private lands were to front on the reservoir, petitioners' remainder would overlook the reservoir with an unobstructed view (Pet. App. A17).

One of the petitioners (Mr. Davenport), an expert for them, and a government expert testified concerning the values of the original tract before the taking and of the remainder tract after the taking. Mr. Davenport estimated the before value at $155,000, and the value of the remainder at $5,000. However, he did not include in his computations the recently acquired 49-acre tract, and admitted that he based his estimates on a personal rather than a market standard. Accordingly the commission discredited his testimony (Pet. Supp. App. 7). Petitioners' expert estimated the before value at $109,000 and the after value at $4,600. He, too, omitted from his estimates the 49-acre tract and did not support his valuation with comparable sales, and his testimony was largely disregarded by the commission (Pet. Supp. App. 7–8).

The government's expert was an appraiser-employee with the government exclusively assigned to appraise properties in the project area, which he had been doing for some four years prior to the commission hearing. He testified to a before value of $80,000 and an after value of $30,000, supported in each instance by comparable sales. He included the 49-acre tract in his deliberations, and also considered project-created enhancement in valuing the remainder. The commission

found his before value testimony highly useful. But it determined that any project enhancement was only general and thus should not have been considered in estimating the remainder's value; it therefore rejected the witness' after valuation (Pet. Supp. App. 4–5, 8–10).

On this record the commission fixed the before value of the entire 218.8-acre tract at $97,000, and the after value of the 74-acre remainder tract at $24,600; it awarded petitioners the difference ($72,400) as just compensation for the land taken (Pet. Supp. App. 10). The commission did not, however, indicate the basis for its ultimate findings of value. The district court summarily affirmed (Pet. Supp. App. A11–12).

The court of appeals reversed (Pet. App. A). That court concluded first (Pet. App. A20) that because the commission had not specified the basis for its valuation of the entire tract before taking, that valuation could not stand under *United States* v. *Merz*, 376 U.S. 192. It then held that the asserted project-created enhancement was special and direct, not general, and hence that the commission "erred factually and legally" in not considering evidence relating to the enhancement (Pet. App. A21–24). Because the only probative evidence as to both the before and the after valuations was that of the government's expert, the court remanded the case to the district court under 28 U.S.C. 2106 with instructions to enter judgment in accordance with that evidence (Pet. App. A25–29).

ARGUMENT

1. Petitioners contend (Pet. 7–12) that the court of appeals incorrectly held on the record before it that

the remainder tract was benefited by special and direct project-created enhancement that had to be considered in determining the value of that tract.

The just compensation requirement of the Fifth Amendment is fully satisfied when the property owner from whom property is taken is "put in as good a position pecuniarily as if his property had not been taken." *Olson* v. *United States*, 292 U.S. 246, 255. In making this determination, the government and the courts properly take into account value created by the project for which the taking is made. *United States* v. *Reynolds*, 397 U.S. 14, 16; *United States* v. *Cors*, 337 U.S. 325, 332–334; *United States* v. *Miller*, 317 U.S. 369, 376. "[I]f the taking has in fact benefited the remainder, the benefit may be set off against the value of the land taken." *United States* v. *Miller, supra,* 317 U.S. at 376. This principle has been codified by Congress in the Rivers and Harbors Act of 1918, 40 Stat. 904, 33 U.S.C. 595, which directs that "any special and direct benefits to the remainder from the improvement" shall be taken into account "by way of reducing the amount of compensation or damages" (see Pet. App. A20).

There is no quarrel here with this well-established rule, but only with its application to the facts of this case. This issue, which in any event does not warrant review by this Court, was correctly decided by the court of appeals. Uncontradicted market evidence established that the project had directly enhanced the market value of the lands surrounding the project. Indeed, petitioners' purchase of the 49-acre tract after announcement of the project itself indicated that en-

hancement had occurred. Petitioners paid $408 per acre for this tract, substantially in excess of the pre-project market data and approximately the per-acre value of the remainder determined by the government's expert ($404). On these facts the court of appeals rightly held that the enhancement to the remainder was special and direct, and had to be considered in fixing its value.

2. Nor is there substance to petitioners' claim (Pet. 5–7) that the court of appeals improperly "*tried* the issue of just compensation *de novo*" by directing that judgment be entered for the highest amount supported by the only testimony of probative value. The commission disregarded the valuations proferred by Mr. Davenport and his expert. The market information and valuations supplied by the government's expert, on the other hand, were "very helpful;" the commission in fact relied on his before values, and discarded the after values only because of its mistaken view as to the enhancement issue (see Pet. Supp. App. 9). The court of appeals did not reweigh the evidence and determine anew the factual questions involved, but rather merely accepted the commission's determination as to the relative weight of that evidence. The government's expert was the only witness whose testimony the commission credited. Once the commission's error on the enhancement issue was rectified, that testimony was correct on both the before and the after valuations, and was the only competent

evidence on these matters. The court of appeals, therefore, properly exercised its powers under 28 U.S.C. 2106 in ordering that judgment be entered in accordance with that evidence. *United States* v. *Eaton,* 169 U.S. 331, 352; *Westchester Fire Ins. Co.* v. *Hanley,* 284 F. 2d 409, 418 (C.A. 6), certiorari denied, 365 U.S. 869. See, also, *United States* v. *Pope & Talbot, Inc.,* 293 F. 2d 822 (C.A. 9); cf. *United States* v. *44.00 Acres in Town of Greece,* 234 F. 2d 410 (C.A. 2), certiorari denied *sub nom. Odenbach* v. *United States,* 352 U.S. 916.

3. There was no unfairness to petitioners because the government presented at trial evidence of a value that was less than estimated just compensation it had previously deposited with the court. A deposit of estimated just compensation is required by the Declaration of Taking Act, 46 Stat. 1421, 40 U.S.C. 258a, the purpose of which is to afford condemnees immediate cash relief and the government immediate possession and defeasible title. *United States* v *Miller, supra,* 317 U.S. at 381; *In re United States,* 257 F. 2d 844 (C.A. 5), certiorari denied *sub nom. Certain Interests in Hillsborough County, Florida* v. *United States,* 358 U.S. 908. The Act requires only a deposit of *estimated* compensation, and that estimate is not even admissible as evidence of the compensation due. See *Evans* v. *United States,* 326 F. 2d 827, 829–830 (C.A. 8); *Chapman* v. *United States,* 169 F. 2d 641 (C.A. 10), certiorari denied, 335 U.S. 860. The amount of the deposit was thus irrelevant to the issues in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
SHIRO KASHIWA,
Assistant Attorney General.
RAYMOND N. ZAGONE,
JACQUES B. GELIN,
Attorneys.

APRIL 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971